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No. 10-559

IN THE

Supreme Court of the United States

JOHN MICHAEL COOKE, RON SWOR, AND THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL,
Petitioners,

v.

TIM TUBRA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondent Tim Tubra's ("plaintiffs") opposition does not change the key undisputed fact stated in the opinion at issue here: "No United States Supreme Court case *** specifically addresses the applicability of First Amendment protections to churches and other religious groups defending against allegations of defamation by a church pastor." *Tubra v. Cooke, et al.*, 225 P.3d 862, 869 (Or. App.), *rev. denied*, 237 P.3d 221 (Or. 2010). The very reasoning of the Oregon decision below – rejecting one set of decisions and embracing another, creating its own new test to decide if the First Amendment is implicated, while

criticizing other tests – is the best evidence of why this Petition should be granted. *Tubra* shows that lower courts are split on the applicable *legal* test. Placing itself in the minority view, *Tubra* conflicts with this Court's decisions.

Plaintiff implicitly concedes that if there was a disciplinary decision, the First Amendment bars his claims. (Opp. 13.) Plaintiff then tries to distract the Court away from his pleadings, which control here. There is no dispute that he was a church pastor (a "minister") and that his claims arose from the ending of his employment with his church. There is also no dispute that this is how plaintiff framed his Complaint and why the trial court should not have allowed the case to proceed past the pleadings.

The heart of plaintiff's opposition is that the "termination" and other church discipline-related allegations in his Complaint are not binding, and that factual disputes at trial preclude review here. However, this Court's decisions (and Oregon law) require that plaintiff's Complaint show that secular courts have subject matter jurisdiction over his claims, but it does not. (App. D.) This is why the case should not have been tried, and trial evidence is irrelevant.

Petitioners' First Amendment defense prevails even assuming plaintiff was defamed because courts lack subject matter jurisdiction over his claims. A disciplinary dispute that plaintiff admits is about "Church politics" (Tr 508-509) should not be decided by secular courts.

Accepting review with the undisputed facts alleged in the Complaint here will allow the Court to state a uniform rule of law that the First Amendment is violated when secular courts entertain this kind of

lawsuit. This will also resolve a deep conflict among the lower courts on this important issue of first impression.

ARGUMENT

A. The Complaint's undisputed allegations, not the trial evidence, control whether subject matter jurisdiction exists, and they show why the First Amendment bars this case.

Plaintiff aggressively tries to steer the Court away from the allegations in his operative Complaint by arguing that factual disputes at trial preclude review, and that petitioners "present this case on facts that never existed." (Opp. 1.)

Plaintiff's effort fails because this case concerns First Amendment subject matter jurisdiction, which must first be established by the allegations in the Complaint or a case cannot proceed. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936) ("He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing."); *see also Dippold v. Cathlamet Timber Co.*, 193 P. 909, 911-913 (Or. 1920) (the "jurisdiction of the subject-matter of any controversy in any court must be determined in the first instance by the allegations in the complaint" and "does not depend upon the existence of a sustainable cause of action or by the evidence subsequently adduced").

Plaintiff's Third Amended Complaint ("Complaint"), which applied at trial, thus establishes the "undisputed facts" for purposes of appeal. It shows that courts lack subject matter jurisdiction over the pastor

defamation claims here because they all arise from statements made solely within the Church concerning why plaintiff's employment with the Church ended. (App. D.) *See Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511, 517 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002) ("most courts that have considered the question whether the Free Exercise Clause divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials have answered that question in the affirmative").[1]

Thus, the Complaint failing to establish subject matter jurisdiction is why this case should never have been tried. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("the very process of inquiry" violates First Amendment rights).

Although he now contends "there was no termination or discipline of a pastor" (Opp. i.), plaintiff pleaded that a "termination" occurred, for which he sought lost income damages, and those allegations control. (Complaint at ¶¶ 25, 31; App. 37a-39a, 47a.) He also alleged that the Church "dismissed plaintiff from his position" and "suspended his pastor's license." (Complaint at ¶ 20; App. 35a.)[2]

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[1] This shows that through attaching the operative Complaint and all allegedly defamatory statements (App. D, F-G), petitioners comply with Rule 14.4, contrary to plaintiff's argument.

[2] Concerning cases prohibiting an "assessment of a plaintiff's pastoral qualifications" (Opp. 13), that is involved here through plaintiff's allegation that the Church questioned his "fitness" and "integrity" to be a pastor. (Complaint at ¶ 29; App. 38a.)

Plaintiff's position *now* is that his employment ended in the normal course, conceding, however, that if he was disciplined, the First Amendment bars his claims. (Opp. 13.) The claimed "financial misappropriation" here was confirmed after he left his position, but it is undisputed that he could not have ministry credentials – he was "done" – at that point. (Tr 134.) There is thus no question that there was disciplinary action by Church authorities.[3]

Moreover, even assuming there was no termination or other discipline, when a defamation claim merely "arises" out of a church's employment relationship with its pastor and involves statements made solely within the church, as here, the First Amendment still bars it. *See Heard v. Johnson*, 810 A.2d 871, 883-885 (D.C. 2002); *Yaggie v. Indiana-Kentucky Synod*, 860 F.Supp. 1194, 1198 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995) ("Courts should be loath to assert jurisdiction over internal church disputes; its exceptions are rare."). This shows why plaintiff's claims are barred even if the Court accepts as true the facts stated in the *Tubra* opinion and the trial evidence plaintiff cites.[4]

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[3] Plaintiff argues that the First Amendment does not bar his claims because "he was no longer employed" by the Church when he was defamed. (Opp. 4.) However, courts reject this argument because examination of the statements still requires an impermissible inquiry into church discipline. *See, e.g., Seefried v. Hummel*, 148 P.3d 184, 190-191 (Colo. App. 2005).

[4] Even assuming trial evidence is relevant, it establishes that plaintiff's claims are barred because it confirms that his claims arose from his Church employment. Plaintiff testified that the Church ordered him to "leave" a "short time" after he was accused of misappropriating Church funds – he was "done." (Tr 132-134, 182.) He also testified that what happened was "a career-ending situation." (Tr 143-147.) Moreover, he presented

The allegedly defamatory letter does address termination and discipline, contrary to plaintiff's contention (Opp. 5), by explaining to the congregation why plaintiff no longer works for the Church and his related "financial misappropriation." (App. F.)

Moreover, the letter shows that the alleged defamation arose out of a church employment relationship and a disciplinary decision. *Tubra* concedes that "the statements related to plaintiff's conduct as a pastor of the church." *Tubra*, 225 P.3d at 873. Indeed, "plaintiff requested a meeting to have neutral leadership from the church hear both sides of the misappropriation issue." *Id.* at 866. This is why the First Amendment bars plaintiff's claims.

Attempting to portray this case as a mere "fact dispute" unworthy of review, plaintiff argues that his Third Amended Complaint "ceased to have any operative effect" because he successfully moved to amend to conform to the evidence at trial. (Opp. 7.) Plaintiff is incorrect. He omits that in response to petitioners' JNOV motion, and in an effort to avoid the First Amendment barring the claims in his Third Amended Complaint, he moved to file a Fourth Amended Complaint omitting the discipline-related allegations. However, at the JNOV hearing, the trial judge denied plaintiff's motion and held that the "motion to conform" granted at trial only addressed damages, not liability allegations. The court thus confirmed that Or. R. Civ. P. 23B only allows motions to amend to "conform to" un-pleaded trial evidence, not to *expunge*

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the expert testimony of a vocational evaluator to support his lost earnings claim. (Tr 331-339, 346-348.) Indeed, the trial court in *Tubra* held that this case "is about statements and actions in the process of termination." *Tubra*, 225 P.3d at 867.

what *was* pleaded and tried. (Tr 25-27, 503-504; JNOV Tr 4, 8-19.)

Plaintiff did not assign error on appeal to the denial of his motion to file a Fourth Amended Complaint. Thus, the Third Amended Complaint controls.

Plaintiff cites *Whinston v. Kaiser Foundation Hospital*, 788 P.2d 428 (Or. 1990), for the proposition that the trial evidence "becomes the pleadings." (Opp. 7.) However, *Whinston* only holds that "the proof" determines whether a cause of action exists, and when an issue "not raised by the pleadings" is tried by consent, a pleading is "automatically amended" for that limited purpose. *Whinston* also does not address subject matter jurisdiction. *Whinston*, 788 P.2d at 431. Here, unlike in *Whinston*, and contrary to the terms of Or. R. Civ. P. 23B, plaintiff unsuccessfully moved to "non-conform" to the proof by attempting to remove the discipline-related allegations from his Complaint. Similarly, in *Rodriguez v. The Holland, Inc.*, 980 P.2d 672, 674 (Or. 1999), cited at Opp. 7, the court merely held that an "amended pleading supersedes the operative pleading." Here, plaintiff's motion to file a Fourth Amended Complaint was denied, and his "motion to conform" only concerned damages. The Third Amended Complaint is thus not superseded.

Therefore, the Oregon authorities above defeat plaintiff's contention that the Court would have to "overrule Oregon state law" to accept review. (Opp. i.)

Plaintiff asserts that, according to petitioners, "as of September 29, 2004," plaintiff could have still been working for the Church, and there was thus no termination. (Opp. 2-3.) However, all allegedly

defamatory statements occurred in October and November 2004, after the September 2004 letter plaintiff attaches to his opposition brief. (App. F-G.) Also, plaintiff alleged that the statement in that letter that this "was not a termination" is false, *i.e.*, plaintiff alleged there *was* a termination, which controls here. (Complaint at ¶¶ 23, 25; App. 36a-37a.)

Plaintiff, citing Oregon judicial estoppel cases, contends that because petitioners previously argued that they did not terminate plaintiff, they cannot contend he was terminated here. (Opp. 6.) Putting aside the fact that plaintiff called this position "false" and alleged he was terminated (Complaint at ¶¶ 23, 25; App. 36a-37a), this ignores that the face of the Complaint must establish subject matter jurisdiction, and the Court thus cannot ignore plaintiff's "termination" allegation. Moreover, even if judicial estoppel applied, it does not change the fact that plaintiff's claims all arise from his employment relationship with a church.

Plaintiff asserts that the "record below does not raise the question presented by petitioners." (Opp. 5.) This is contradicted by the *Tubra* opinion, the First Amendment Affirmative Defense below, and the granted JNOV motion. This Court should not be distracted by plaintiff's attempt to portray this case as requiring the resolution of factual disputes. The undisputed facts in plaintiff's Complaint control. Nothing that happened at trial mitigates the concern that this kind of case cannot be tried without violating the First Amendment.

B. The *Tubra* decision adds to the deep conflict among the lower courts about the scope of First Amendment protection for churches against pastor claims that the Court should resolve through accepting this case.

Plaintiff contends that "there is no split in legal authority among the lower courts," and that "the diversity of results reflects only the diversity of facts before the courts." (Opp. 12-16.) The *Tubra* opinion alone belies plaintiff's argument. *Tubra* cited *Heard* and its 3-part First Amendment test for pastor defamation claims, but held that it was "not persuaded that [*Heard*] is the correct rule." *Tubra*, 225 P.3d at 871. *Tubra* instead relied on *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993), and then stated its own 3-part test, which provides much narrower First Amendment protection than *Heard*. *Tubra*, 225 P.3d at 870-872 and n. 10.

Marshall, in turn, has been rejected by other courts. *Yaggie*, 860 F.Supp. at 1198-1199 (choosing "not to follow the *Marshall* rationale" because "we cannot allow it to outweigh the substantial federal authority holding to the contrary," and barring a minister's defamation claim even though "the alleged defamatory statements do not express any religious principles or beliefs" because the case involved "a conflict confined within" a church "concerning the employment relationship of its minister").

Moreover, Pennsylvania recently issued yet another 3-part test. *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1103 (Pa. 2009).

Conflicting results are thus occurring not because a consistent test is being applied to different facts.

Indeed, the over 30 cases plaintiff cites (Opp. 13-16) ironically defeat his argument that there is no conflict. There are at least four different *legal tests* that cause different results. "With so many federal and state courts weighing in on the issue, it is no surprise that a split of authority has developed." *Calvary Christian School, Inc. v. Huffstuttler*, 238 S.W.3d 58, 64 (Ark. 2006). It is improper to allow lower courts to apply different legal tests to the same First Amendment text. The Court should accept review to resolve this conflict.

Plaintiff cites *Jones v. Wolf*, 443 U.S. 595 (1979), for the argument that "neutral laws of general applicability" should control here. (Opp. 10.) However, the *Jones* rule only applies to disputes about the ownership of church real estate, not tort claims like defamation. *See Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986) (dismissing a minister's defamation claim based on a lack of subject matter jurisdiction and, citing *Jones*, holding that the "neutral principles doctrine relating to church property is simply not applicable in the instant case.").

Plaintiff's reliance on *Employment Division v. Smith*, 494 U.S. 872 (1990), and related cases (Opp. 11.) is also misplaced because they concern criminal laws, not civil tort claims by pastors against their church that relate to intra-church "communicative activity." *Smith*, 494 U.S. at 879-882. The Church thus does not seek to be a "law unto itself" (Opp. 11), but merely seeks to uphold its constitutional rights against civil claims by its pastors relating to church discipline.

Plaintiff would have this Court ignore the fact that "accusations of misconduct, discussions of that mis-

conduct within the church," and the "exaggerated language that accompany such activities" are "unavoidable parts of the difficult process by which dissatisfied churches end employment relationships with their pastors." *Heard*, 810 A.2d at 887. *See also Higgins v. Maher*, 258 Cal. Rptr. 757, 759-761 (Cal. App.), *rev. denied* (Cal. August 10, 1989), *cert. denied*, 493 U.S. 1080 (1990) (if "civil courts enter upon disputes between bishops and priests because of allegations of defamation," then "it is difficult to conceive the termination case which could not result in a sustainable lawsuit.")

Denying review will thus increase this type of litigation and further impair churches' First Amendment rights. *See also* John Gibeaut, "First Amendment Rites – Damaging words cost pastor his pulpit but land him big bucks," *ABA Journal*, June 2010, at 19 (the court in *Tubra* "acknowledged that they were pushing the envelope," and "observers predict that the initial victory in Oregon will encourage others.").[5]

Churches are legitimately concerned about fitness for service. Where a dispute goes to that issue, it is settled that the civil courts must stay out of the dispute. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 7-8 (1929) (a church's decisions concerning the "qualifications of a chaplain" are accepted as "conclusive" by secular courts). *Gonzalez*

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[5] Plaintiff's reliance on older cases where this Court denied certiorari (Opp. 16, n. 7) is misplaced because none of those cases allowed a wholly intra-church defamatory statement to be actionable, and a writ denial has "no implication whatever regarding the Court's views on the merits of a case," especially because "[w]ise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-919 (1950).

controls because plaintiff alleged that he was defamed through petitioners imputing to him an "unfitness" and "lack of integrity" to be a church pastor. (Complaint at ¶ 29; App. 38a.) This is why plaintiff's reliance on *Gonzalez* is misplaced.

Tubra did not announce "the correct rule of law." (Opp. 16.) *Tubra* is in the minority in holding that the First Amendment does not bar a pastor's defamation claim arising solely from intra-church statements. *Cf., e.g., Cha* and *Heard*. *Tubra* stands alone in allowing secular juries to decide whether a statement is "purely religious" or has a "nonreligious purpose." *Tubra*, 225 P.3d at 872.

The Court should accept review to resolve the conflict furthered by *Tubra* and settle this important issue of first impression. *Tubra's* legal test is inconsistent with this Court's First Amendment decisions. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717, 724-725 (1976) (there is "no dispute that questions of church discipline *** are at the core of ecclesiastic concern," and the First Amendment "requires that civil courts accept [a church's disciplinary] decisions as binding upon them."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) (it "would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed").

CONCLUSION

The writ should be granted pursuant to Rule 10(c) so the conflict among the lower courts about the important issue of first impression here can be resolved. Whether a church enjoys the full protection of the First Amendment should not depend on the state where it is located.

Respectfully submitted,

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